

2005

Theory Saved My Life

Kris Franklin

New York Law School, kris.franklin@nyls.edu

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters

 Part of the [Legal Education Commons](#)

Recommended Citation

8 N.Y. City L. Rev. 599 (2005)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

“THEORY SAVED MY LIFE”

Kris Franklin*

*The most important criticism of theory, it seems to me, is that it is useless. And theory can be useless: meditation at its most abstract and inapplicable. Yet theory is also just another name for thinking, for deciding, for arguing and examining one's own beliefs and principles as well as the beliefs and principles we have been taught. Theorizing is something we all do.*¹

I. “THEORIZING IS SOMETHING THAT WE ALL DO”

There is something challenging and liberating in affirming, as Ruthann Robson does in *Lesbian (Out)law*, that “theory is just another name for thinking.”² Given the intensity of the “theory wars”³ in the 1980s and the ongoing suspicion of theoretical supposition at every level of U.S. culture,⁴ hers is hardly a common attitude. In part this may be because, as Robson herself suggests, “theory” has a bad reputation: overly abstract, “useless,” “out of

* Professor of Law, New York Law School. Thanks for commentary on early drafts to Stephen Ellmen and Elizabeth Rosen, and for research help to Liat Cherkis. Special thanks to Sarah E. Chinn, without whom this article would not have been written.

¹ RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* 15 (1992) [hereinafter ROBSON, (OUT)LAW].

² *Id.*

³ David H. Richter provides an excellent synopsis of the content, context, and stakes of the “theory wars” of the 1980s and the “culture wars” of the 1990s. DAVID H. RICHTER, *FALLING INTO THEORY: CONFLICTING VIEWS ON READING LITERATURE* 1-30 (1994).

⁴ An instructive example is the difference in official response to the deaths within several months of each other of two major theorists, one French and one American, Jacques Derrida and Susan Sontag. Upon announcing Derrida's death, France's President Jacques Chirac proudly noted that “[w]ith him, France has given the world one of its greatest contemporary philosophers, one of the major figures of intellectual life in our time,” whose work was “read, discussed, and taught around the world.” Patricia Sullivan, *Jacques Derrida Dies*, WASH. POST, Oct. 22, 2004, at C11. By contrast, the headline for the New York Times's obituary of Derrida was representative of his reputation on this side of the Atlantic: *Jacques Derrida, Abstruse Theorist, Dead at 74*. See Jonathan Kendall, *Jacques Derrida, Abstruse Theorist, Dead at 74*, N.Y. TIMES, Oct. 22, 2004, at A1. Moreover, President Bush made no comment on Sontag's death at all, despite her incalculable contributions to the intellectual life of the United States on a variety of subjects, ranging from camp, illness, photography, torture, aesthetics, and the value of popular culture, and her status as, in the words of the New York Times, “one of the most lionized presences . . . in 20th century letters.” Margalit Fox, *Susan Sontag, Social Critic with Verves, Dies at 71*, N.Y. TIMES, Dec. 29, 2004, at A1.

touch," and the like.⁵ Such complaints imply, of course, that theory itself has no practical value.

But perhaps we no longer need to set up an opposition between "theory" and "practice," or between abstraction and positivism. In the wake of the conflicts over interpretation that took up so much energy in previous decades, the rise of Critical Legal Studies, American poststructuralism, and a host of new theories of reading, the consensus around how legal texts are read and legal scholarship is written has changed dramatically. Even if they do not explicitly engage with the raft of critical theories available to them, legal scholars today can hardly avoid at least being aware of them. Indeed, these debates irrevocably shaped the way legal scholarship is done.

Thus, without needing to engage in the debates surrounding the 20th century's great capital "T" Theories,⁶ Robson's notion of theory is simpler and more elegant: it is imagination, construction, creativity. Theory and ideas are inextricable. In this sense, she seems close to the Marxist theorist Antonio Gramsci, for whom theory was an intrinsic part of human existence. As Gramsci argues, "[t]here is no human activity from which every form of intellectual participation can be excluded: *homo faber* [Man the Maker] cannot be separated from *homo sapiens* [Man the Thinker]. Each man has a conscious line of moral conduct, and therefore contributes to sustain a conception of the world or to modify it, that is, to bring into being new modes of thought."⁷ "Theorizing," a term Robson uses over and over again in her own scholarly work, is not creating a static body of knowledge or a single box of tools but a phenomenon; not a result but a process. Theorizing is as inevitable and as

⁵ As Robson wryly observes, "Theory as an activity is attacked by many . . . , usually in a theoretical manner." ROBSON, (OUT)LAW, *supra* note 1, at 15.

⁶ Such universal theories (Marxism, psychoanalysis, free-market capitalism, poststructuralism, to name a few) seem not be what Robson has in mind in the above quotation. But perhaps it is also true that we are moving away from the time of such totalizing Theory. The strengths of such theoretical apparatuses—their certitude, their claims to universality, their answers to every question—are also weaknesses. It can sometimes seem as if adherents of such classical Theories are more interested in constructing impermeable categories with foolproof explanations, rather than grappling with the chaotic and often contradictory realities of the world we live in. Moreover, it is quite likely that Theory's success in integrating itself into intellectual life has also been a cause of its demise: questioning the universality of a concept or experience, assuming that a text can deconstruct itself, thinking about the ways in which meaning is constructed through the interpretive process, working with historical context, are no longer radical approaches to legal or literary texts. Rather, they are now part of the landscape of interpretation.

⁷ ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 9 (Quintin Hoare & Geoffrey Nowell Smith trans. & eds., 1971).

human as understanding. It is not simply rhetorically expedient, then, but from Robson's point of view, entirely understandable, for the unnamed narrator in her novel *Cecile* to observe that she "could [say], *Theory saved my life.*"⁸

But if theorizing is as integral to thought as Robson suggests, and if critical reflection on legal doctrine has become inextricably intertwined with our understanding of law itself, the implications for law and legal education are significant. In this essay I argue that as teachers of law, we need to think seriously about the role of theorizing at every level of legal pedagogy. Just as we must specifically and explicitly show students the fundamentals of their new profession, such as how to "read" a case or "synthesize" a series of legal interpretations, we must also show them that a critical part of that endeavor, indeed a critical part of legal analysis itself, is "theorizing." We must undo the opposition between "theory" and "basics"⁹ and recognize that theorizing is itself a basic component of legal education.

II. HERMENEUTICS AND LEGAL EDUCATION OR, "HOW TO RECOGNIZE A LEGAL THEORY WHEN YOU SEE ONE"

Ideally, theory elucidates through connection rather than obscuring through complexity. Theory helps us consider, reflect and communicate ideas. That is not to say that theory cannot be complex (God knows) but rather that its goal is ultimately to untangle, to lay out the various strands of a phenomenon. With theory, details are more than just episodic, unrelated chunks of fact. They form a constellation in which theory connects the stars and constructs the image. The specific story a theory tells sometimes matters less than that it tells a story at all—that it turns otherwise random-seeming elements into larger structures that carry meaning that comments on those elements and makes sense out of them.¹⁰

⁸ RUTHANN ROBSON, *CECILE* 122 (1991). The narrator here seems to be referring specifically to Marxist theory and class analysis, and it should be noted that is not clear that her affinity for theory at this point in the novel is entirely well thought out. But her longing for an intellectual framework with which to understand and reflect on the world around her is certainly portrayed sympathetically.

⁹ Legal scholars and educators have worked hard to explode the artificial division between "theory" and "practical skills." For but one of numerous discussions of the pointlessness of such a distinction for beginning law students, see Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121, 126 (1994). However, the place of theory in the *learning* of basic reasoning in law remains under-examined.

¹⁰ Consequently, the stories constructed are likely to vary with culture, reflecting

"Making sense" is, of course, the most challenging part of beginning the study of law. First-year students are confronted with what theorists have called the "hermeneutic circle."¹¹ The circle represents the paradox of comprehension: we understand a whole phenomenon through recognizing its constitutive parts, but we cannot recognize the meaning of those parts if we do not understand the whole. At what point, these philosophers asked, can we understand anything? How do we enter this apparently closed circle?

While this formulation of the question may seem abstract, it is the very question beginning law students, and the professors struggling to teach them, are asking themselves. The traditional case method of legal pedagogy, with its emphasis on daily parsing the meaning(s) of cases within a particular legal doctrine so that students may eventually come to understand not only something about the doctrine itself, but also about legal methodology as a whole,¹² serves to exaggerate the myopia of law students. That is, its very structure implies that the unified cosmos can be seen through analysis of the microcosm—analysis of individual cases will inevitably teach students how to understand Law. But each individual case has little meaning without an understanding of what the law does, how it speaks.

Thinking through this conundrum in a legal context is hardly

the way that the culture sees itself. The animated film *SHREK* (DreamWorks SKG 2001) provides an excellent example of this, when the ogre protagonist Shrek and his companion Donkey lie on their backs, staring at the night sky, as Shrek explains the meaning of the different constellations and the tales of mythological ogres each represents:

Shrek: That one, that's Throwback, the only ogre to ever spit over three wheat fields.

Donkey: Hey, can you tell my future from these stars?

Shrek: The stars don't tell the future, Donkey. They tell stories. Look, there's Bloodnut, the Flatulent. You can guess what he's famous for.

Donkey: I know you're making this up.

Shrek: No, look. There he is, and there's the group of hunters running away from his stench.

Donkey: That ain't nothin' but a bunch of little dots.

Shrek: You know, Donkey, sometimes things are more than they appear.

¹¹ Friedrich Schleiermacher introduces this concept in his critical fragment *Outline of the 1819 Lectures*, in which he writes, "[t]here is . . . an opposition between the unity of the whole and the individual parts of the work, so that the task could be set in a twofold manner, namely to understand the unity of the whole via the individual parts and the value of the individual parts via the unity of the whole," a process Schleiermacher identifies as a circle. FRIEDRICH SCHLEIERMACHER, *HERMENEUTICS AND CRITICISM* 109 (Andrew Bowie trans. & ed., 1998).

¹² KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 41-69 (1960).

new. Challenges to the classical notions of law as "rational" and nearly "scientific" can be found in almost every era, but they exploded on the legal critical scene in the mid- to late-1980s. Such work on legal interpretation coincided with the rise of deconstruction and other post-structuralist literary critical strategies and incorporated the insights of the Critical Legal Studies movement, which offers explicitly political legal realism critiques of legal decision-making.¹³ The debates on reading and interpretation of legal texts that emerged towards the end of the 1980s and early 1990s drew upon these strains of thought and coalesced most notably in work done in the field of "law and literature."¹⁴ Some of the scholarship produced in this still-vibrant discipline remains controversial, but much of it, especially its ideas about the contingency of legal interpretation, reflects now commonly-held wisdom about how law works. Thus I offer a brief and undoubtedly oversimplified tour of some of the foundational critical thinking that appears to have become incorporated into our most basic understandings regarding how the law works.

Early philosophers of interpretation focused on authorial intention in understanding the meaning of written texts, positing that by entering into the world from which a set of ideas emerged, one could intervene into the hermeneutic circle. This required at least some knowledge of the writer him or herself, but more importantly, demanded examination of the author's worldview.¹⁵ In many ways, this approach is replicated in classical legal education; by discerning the meaning and intentions of seminal cases, students can find an entry into the mysterious workings of legal analysis.¹⁶

¹³ ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 1-15 (1986).

¹⁴ Many of these debates can be found in *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* (Sanford Levinson & Steven Mailloux eds., 1988), which features some of the most important legal and literary theorists of interpretation of the time (and even now) hashing out these very questions.

¹⁵ As Wilhelm Dilthey argues, "[a]ll human creations spring from the inner life and its relations to the outer world," and at the same time, "[i]n every moment of our existence there is a persistent relation of our individual lives to the world that surrounds us as a perceptual whole." WILHELM DILTHEY, *THE ESSENCE OF PHILOSOPHY* 33, 39 (Stephen A. Emery & William T. Emery trans., 1954). In some ways, then, the work of interpretation is to understand the relationship between the artist and her or his *Weltanschauung*, or worldview—another kind of hermeneutic circle—and examine how those elements combine in artistic expression. *Id.* at 39. This was particularly true of poetry, which "is able to express whatever can appear in the mind of men—external objects, inner states, values, decisions—and this language, its means of expression, already involves the grasp of a given through thought." *Id.* at 53.

¹⁶ LLEWELLYN, *supra* note 12, at 41.

Despite the importance of classic hermeneutic theory for legal scholars,¹⁷ however, subsequent interpretation of that work has proven richer for understanding the unique ways in which legal reasoning operates. For several more recent scholars, comprehension resides in the relationship between the text and its reader: that is to say, in *interpretation* not *intention*.¹⁸ Understanding is a process of continual negotiation and repositioning, constrained by the questions the text asks the reader and the reader asks the text, all of which are shaped and colored by history, culture, nation, and any number of other conditions. Reading itself is oriented around process. The reader must continually re-adjust her understanding of what she sees in reaction to what has come before and how it connects to or contradicts the ongoing reading experience.¹⁹

Seeing interpretation as a dynamic relationship between reader and text has a number of significant ramifications. First of all, as Stanley Fish argues, it locates meaning in the interpretive process itself.²⁰ The reader "makes sense" of the text, continually revising meaning according to the ongoing reading experience. We bring expectations of meaning, genre, and importance with us as we read.²¹

¹⁷ Placed in context in the preface to Levinson & Mailloux, *supra* note 14, at ix-xi.

¹⁸ See, e.g., HANS-GEORG GADAMER, *TRUTH AND METHOD* (1989). Furthermore, in an essay on Rainer-Maria Rilke's use of punctuation, Gadamer argues that the reader's experience of a poem, of the experience of reading itself, comprises a large part of how one interprets the text, and that "what the poet meant can and must not have a binding force here. If we want to understand a poem, then that requires that we understand what the poem 'means.' . . . Into what shape and significance it settled when the movement of the language stopped hovering indecisively between possibilities and finally attained form and fixity as a structure obscurely ordained, perhaps as surprising for the poet and for us." HANS-GEORG GADAMER, *LITERATURE AND PHILOSOPHY IN DIALOGUE: ESSAYS IN GERMAN LITERARY THEORY* 135 (Robert H. Paslick trans., 1994).

¹⁹ In his analysis of John Milton's sonnet *When I Consider How My Light Is Spent*, Stanley Fish guides the reader through this process of interpretation and re-adjustment, concluding that "we leave the poem unsure, and our unsureness is the realization (in our experience) of the unsureness with which the affirmation of the final line [of the sonnet] is, or is not, made." STANLEY FISH, *Interpreting the Variorum, in IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 154-57 (1980).

²⁰ *Id.* at 162-67.

²¹ Thus we see a text as a poem, for example, not simply because it conforms to the generic conventions of poetry, but because we expect to see a poem (it appears to be broken into stanzas, for example), and we apply our expectations to the text accordingly. Fish's essay *How to Recognize a Poem When You See One* addresses this very issue. He describes presenting a group of students with what he identified to them as a religious poem from the seventeenth century, but what was really a list of names of prominent linguists, left on the board from a previous class, noting that "[i]mmediately they began to perform in a manner that . . . was more or less predict-

But interpretation is not totally dissociated from convention. Rather, our expectations of a text come from what Fish and other critics have called "interpretive communities"—groups of readers who share assumptions about what texts mean.²² When we learn to read, we are learning not just mechanics, but also the techniques of our various communities: how to recognize and understand a poem, a play, a romantic comedy and, of course, a legal argument.

And to a trained reader of law, a "case"—that is, a judicial opinion—is equal parts grammar and rhetoric,²³ equal parts translation and argument. By necessity, interpretation points in several directions at once, serving several masters: the text being translated, the critic elucidating the text, and the audience to whom the text is explained.²⁴ Interpretation of law, then, is not just about discerning a singular raw meaning, if such a thing exists. Nor is it about simply gathering all possible meanings. For lawyers, all theories are not created equal. In litigation, different theories are in competition until the "best," or at least the most convincing one, is adopted by the court.²⁵ Once a particular theory is adopted by a court it is anointed as precedent, and all other possible approaches to the question, at least temporarily, recede in importance, though

able." Starting with the top line of the "poem," the students constructed a biblical exegesis of the text that identified a series of religious images: the cross, the Virgin Mary, Jacob's ladder, and so on. Fish contends that his students were not wrong in their interpretation, but that they were doing exactly what he had asked them, based on what they believed they were seeing—interpreting a religious poem through the techniques they had learned from him. His central argument is that "as soon as my students were aware that it was poetry they were seeing, they began to look with poetry-seeing eyes, that is, with eyes that saw everything in relation to the properties they knew poems to possess." Moreover, those properties were defined by the interpretive community of "academic readers of poetry," of which Fish is a prominent member, and from whom this group of students learned the very skills that allowed (or even compelled) them to see a list of names as a religious text. Ultimately, for Fish, skilled reading is "knowing how to *produce* what can thereafter be said to be there." *Id.* at 322-37.

²² *Id.* at 161.

²³ By grammar here I mean the structure of language as it constructs meaning, in the largest sense; by rhetoric I mean not just stylistics but the desire to use language to persuade rather than describe or categorize. In many ways this is a false dichotomy. As Paul de Man has argued, grammar and rhetoric are deeply intertwined, each depending upon each other for coherence and each undoing the apparent intentions of the other. PAUL DE MAN, *ALLEGORIES OF READING: FIGURAL LANGUAGE IN ROUSSEAU, NIETZSCHE, RILKE, AND PROUST* 3-19 (1982).

²⁴ Steven Mailloux offers a rough definition of interpretation as "acceptable and approximating translation," but asks, "(1) Approximating *what*? (2) Translating *how*? and (3) Acceptable to *whom*?" Steven Mailloux, *Interpretation*, in *CRITICAL TERMS FOR LITERARY STUDY* 121, 121-22 (2d ed., Frank Lentricchia & Thomas McLaughlin eds., 1995).

²⁵ ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 173 (2000).

they do not necessarily disappear entirely.²⁶ Subsequently, each individual opinion may take on a different meaning when combined with others and organized into a new "synthesized" legal rule.

These are questions that engage the issue of rhetoric, a central question in understanding judicial decision-making, and perhaps even more crucially, judicial decision *writing*. After all, as Steven Mailloux notes, "interpretation . . . can be politically interested;"²⁷ indeed, it is almost inevitably so.²⁸ Seemingly neutral interpretive acts such as locating the intention of the author depend upon persuasion and negotiation.²⁹ In other words, as the Socratic method shows law students time and again—what a case *means* can depend on where you stand and how you read it.

This is not to say that interpretation is infinitely up for grabs, or dependent only upon one's political or rhetorical stance. Interpretive communities, such as the body of legal readers, set the terms for acceptable interpretation, and authorial intention certainly remains an important component of legal interpretation.

Although interpretive boundaries can be fairly elastic, there is an outer limit beyond which any given set of interpretations cannot go if their proponent wants to be trusted and understood.³⁰ But interpretation *is* contingent, not inevitable—we see what we see because we expect to see it, and we explain it in ways that comport with our larger political or rhetorical goals.³¹ As Mailloux observes, "[t]aking a position, making an interpretation, cannot be avoided.

²⁶ Such ideas occasionally mutate and reemerge, and some even eventually resurrect into controlling precedent. One such famous example is Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J. dissenting). See also *Lochner v. New York*, 198 U.S. 45 (1905) (Harlan, J. dissenting).

²⁷ Mailloux, *supra* note 24, at 127.

²⁸ Reading the debate over the Anti-Ballistic Missile (ABM) Treaty in the mid-1980s, Mailloux contends that what was at issue was not simply the correct interpretation of the treaty, but the ability to set the terms of interpretation itself, the power to argue that the treaty needed to be interpreted, that it was not self-evident. Through this example Mailloux shows how one of the drafters of the treaty was convinced by the Reagan administration that his earlier interpretation of what he had written was in fact incorrect, or at least could not answer the new questions that were addressed to him about the treaty. *Id.* at 131.

²⁹ Which might explain why, in the words of Amsterdam and Bruner, "[i]n legal discourse, and especially litigation, all interpretations are inherently suspect." AMSTERDAM & BRUNER, *supra* note 25, at 174.

³⁰ FISH, *supra* note 19, at 303-21.

³¹ Of course, this doesn't address the question of cynicism in argument—did the Reagan administration really believe that the ABM treaty was ambiguous and needed reinterpretation, or did they simply want to push through the then-new SDI program, and realized that the only way to do so was to call the treaty into question? See Mailloux, *supra* note 24, at 131.

We are always interpreting the world around us, and always arguing at particular moments in specific places to certain audiences."³² What matters is that as readers we understand the terms of interpretation, that we are aware of the interpretive communities of which we are a part, and the persuasions those interpretations bring with them.

If we take these ideas as a given, then, the way we look at law is inevitably more complicated. Recognizing that interpretation is both a basic human activity and wholly historically and culturally conditioned—that to interpret is at the same time to reproduce and reinforce a given way of reading a text and the world—is crucial to understanding how legal interpretation functions and what we can do with it. Those in the legal community—including law students—consequently need the ability to think laterally: to think around corners so that we can generate several different theories and work out which fits best and which best contextualizes and connects the material. Such intellectual flexibility gives law students the tools they need to not only understand the cases they read, but to know what to *do* with them—or more accurately, to imagine the possibilities and limitations of what may be *done* with them.

There are profound implications of this comprehension of interpretive process for beginning law students. Law schools are interpretive communities *par excellence*. One of the central purposes of legal education is to inculcate in its students the interpretive conventions of the discipline.³³ Initially, at least, the details of legal doctrine cases are, arguably, less important than the methods of reading into which they induct novice lawyers. Thus one of the central projects for such students is to read the artifacts of our community—judicial opinions—in order to discern both our community's ways of thinking *and* its ways of communicating. Therein lies the tension, for it can be difficult to see one without understanding the other.

When students begin their legal education, then, they are not just learning facts and doctrines, but the methodology of legal reasoning.³⁴ We glibly dub this process "learning to think like a lawyer." But more precisely, it is the act of acculturating oneself to

³² *Id.* at 134.

³³ This is a staple, almost to the point of cliché, of popular writing about legal education and practice. That is, to take those who come in with minds "like a bowl full of mush," and prepare them to "leave thinking like a lawyer." *THE PAPER CHASE* (Twentieth Century Fox 1973); see also SCOTT TUROW, *ONE L* (1977).

³⁴ Roscoe Pound, *What Is a Good Legal Education*, 19 A.B.A. J. 627, 631 (1933).

our interpretive community. Like anyone adapting to a new culture, beginning law students often feel disoriented, alienated, and not wholly aware of the process they are undergoing. They are imbibing (or resisting) a world view, a way of arguing about the law and the world, whether they realize it or not. Indeed, the less they realize it, the more difficult it may be for them to learn. Complicated as it may be for novice lawyers to pierce the hermeneutic circle of legal interpretation, it may be even more difficult for them if they are *not* asked to wade into the murk of interpretive possibility swirling around them.

I argue that theory, particularly theory of interpretation, is irreplaceable for real, effective teaching of law and legal reasoning. I am not necessarily advocating that we teach some version of this history of theorizing, though. Law students must be able to see, construct, deconstruct and *use* legal theories, even though it does not immediately follow that they must be able to describe or *theorize* about theory.³⁵ The first-year curriculum is awash in theoretical constructs, however unspoken. The problem is that the theory is difficult to describe because it can seem invisible or feel intuitive to those of us used to working with it since we have already absorbed its lessons and are engaged in reproducing those lessons. The solution is to make theoretical work in law visible, rather than to pretend that it is not there.

III. TEACHING THEORY

In recent years, academics concerned with legal pedagogy have tried to find ways to integrate students more effectively into our interpretive communities. Over the past several decades, many, if not most law schools have looked at the question of why some law students thrive under standard law school pedagogy³⁶

³⁵ There might be benefits to all or some students if we were to review the scholarship surrounding interpretive processes and learn to name and describe some of the varying ways interpretation can operate in law, but it is equally true that this might *not* be helpful. Perhaps such meta-theory would give some students insight into the legal process, but it is by no means certain that it would do so for all, or even for most. More immediately, though, it is difficult to imagine how that work could be integrated into the already-packed law school curriculum even if there were consensus that it ought to be. I propose something more limited: that we use the insights of this work in order to ensure, at the very least, that students learn to understand that legal arguments are linked by *theories* of what is important in the sources (cases and statutes) they rely upon, and that they need to learn to develop (and support) such theories themselves.

³⁶ And of course, countless commentators have debated whether that traditional pedagogy is, in fact, the best way to train lawyers at all. Monographs examining this question are too numerous to document, but despite whole journals and conferences

while other students struggle, when incoming predictors suggested that they would or could do as well as the first set.³⁷ There are crucial issues of race, class and gender built into this question. We know that we are losing, or at least failing to capitalize on the talents of an enormous pool of law students every year.³⁸

To solve this problem, school after school has turned to academic support professionals, whether faculty or administrators, to offer supplementary teaching.³⁹ Sometimes for academic credit, but often not, we drill these students in the rudiments of legal reasoning, or at least, of legal education. The usual sense of this work is that struggling law students, and perhaps all beginning law students, most need to be taught the basic teaching of basic skills.⁴⁰ Much of that teaching has been tremendously helpful to a great number of students.⁴¹ I do such teaching myself, and I cannot imagine a successful academic assistance program that does not offer this type of enrichment. However, I believe that such work is richer, more easily absorbed, more *valuable*, if it is embedded in a theoretical comprehension of the students' own roles as interpreters of law.

dedicated to the topic, the classic Socratic, case-method legal classroom remains the standard model, and is likely to remain so for the foreseeable future. See Nancy B. Rapoport, *Is "Thinking Like a Lawyer" Really What We Want to Teach*, 1 J. ASS'N L. WRITING DIR. 91, 105-08 (2002) (speculating on reasons why law school curriculum remains relatively static).

³⁷ For a thoughtful discussion of the ways in which potentially successful law students may perform less successfully than their peers, and hence diminish their professional opportunities, see Vernellia R. Randall, *Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools*, 16 T.M. COOLEY L. REV. 201, 205-12 (1999).

³⁸ Worse still, we know that that pool is disproportionately students of color, and students from disadvantaged economic backgrounds. For discussions of the differential performance of white law students and law students of color, see, for example, Judith G. Greenberg, *Erasing Race from Legal Education*, 28 U. MICH. J.L. REFORM 51, 51-52 (1994); Kevin Deasy, *Enabling Black Students to Realize Their Potential in Law School*, 16 T. MARSHALL L. REV. 547 (1991); Derrick A. Bell, Jr., *Law School Exams and Minority-Group Students*, 7 BLACK L. J. 304 (1981).

³⁹ For a thorough description of the theoretical underpinnings of the academic support movement in legal education through the late 1980s and 1990s, see LAW SCHOOL ADMISSIONS COUNCIL, *A Practical Guide for Law School Academic Assistance Programs* (on file with the New York City Law Review).

⁴⁰ There are a burgeoning group of excellent resources that identify and describe these skills for incoming law students. See, e.g., DENNIS J. TONSING, *1000 DAYS TO THE BAR: BUT THE PRACTICE OF LAW BEGINS NOW* (2003); RUTA K. STROPUS & CHARLOTTE D. TAYLOR, *BRIDGING THE GAP BETWEEN COLLEGE AND LAW SCHOOL* (2001); CAROLYN J. NYGREN, *STARTING OFF RIGHT IN LAW SCHOOL* (1997).

⁴¹ See Leslie Yalof Garfield & Kellie Koenig Levi, *Finding Success in the 'Cauldron of Competition': The Effectiveness of Academic Support Programs*, 2004 BYU EDUC. & L.J. 1 (2004).

It is no secret that some students come to law school better prepared than others to translate information that they receive from their teachers about how to use legal doctrine to analyze novel facts—a process which is, of course, at the heart of most law school exams. Others struggle to make that leap. The advice given to students about how to learn the material and excel academically is often contradictory: “IRAC⁴² everything,” “no, there’s no formula in law, you have to *think*,” etc.

This confusion probably springs from well-intentioned but differing approaches to helping students deal with the complexities of legal interpretation and legal analysis. We want students to develop effective techniques for reading cases, constructing analogies, generating support for propositions, reasoning deductively, and writing clearly and effectively. Ask law professors who have just gone through a stack of 85 to 150 exams what separated the A’s from the B’s, and many will point to careful application of legal rules to novel facts, well-organized responses, and so on. Most professors will then move on to mention something more ethereal, especially to describe the strongest work: “this student really understood what the questions were asking, she *got* Contracts, and it showed.” Law students cannot earn such descriptions unless they can fluidly see the theories at work in the materials they have studied and can seamlessly construct theories applying law to the exam’s fact pattern to build persuasive legal arguments.

After all, isn’t developing a theory, in the sense of a “scheme or system of ideas . . . held as an explanation . . . of a group of facts”⁴³ essentially what we *mean* when we direct students to do “case synthesis”?⁴⁴ We want students to know how to put together strings of cases and understand the broadest and narrowest limits of law that may be ascribed to the group as a whole. That is to say, our students “are expected to understand course material in a comprehensive way for a traditional law school exam when the course materials are taught in a piecemeal fashion.”⁴⁵ This is certainly difficult—like looking at a pointillist painting, it requires be-

⁴² That is, state the *Issue* to be addressed, relevant *Rule* (of law), *Application* of the rule to the facts at hand, and hence, the *Conclusion*.

⁴³ 17 THE OXFORD ENGLISH DICTIONARY 902 (2d ed. 1989).

⁴⁴ See, e.g., STROPUS & TAYLOR, *supra* note 40, at 55 (“In synthesizing cases, one combines all the rules learned from the cases to devise one rule or set of rules that encompasses a body of law.”).

⁴⁵ Adam G. Todd, *Exam Writing as Legal Writing: Teaching and Critiquing Law School Examination Discourse*, 76 TEMP. L. REV. 69, 73 (2003).

ing able to see an entire scene while being simultaneously aware that it is made up of innumerable and separable marks.

And yet, this precise skill is one that we seem never, or rarely, to teach law students directly.⁴⁶ Too often our classical curriculum assumes either that this skill cannot be taught, or that it is solely for our "strongest students" to discern. Too often we think that this intellectual enterprise is too advanced for students who are not succeeding in law school, or that this is a goal toward which our students are slowly progressing. We can think of this theory of vertical learning as the "video game model"—students must start at the most elementary material and only by passing successfully through one stage can students move up to, and in some instances even become aware of, the next more challenging level.

This approach has its strengths. A particularly useful articulation of pedagogy based on such a model is laid out in Paula Lustbader's foundational article on legal education, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*.⁴⁷ Adopting an extended metaphor of architecture and building, Lustbader identifies different stages in the learning process, from technician⁴⁸ to drafter⁴⁹ through to designer⁵⁰ and creator.⁵¹ While she acknowledges that different students move through these stages at different rates, in large part her essay is designed to help teachers provide students with the best tools to progress to the highest stage they can.

⁴⁶ Though it is the precise set of skills described in the "Legal Analysis and Reasoning" section of the MacCrate Report on Legal Education, AMERICAN BAR ASSOCIATION, STATEMENT OF FUNDAMENTAL LAWYERING SKILLS AND PROFESSIONAL VALUES 25-31 (1992).

⁴⁷ Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 WILLAMETTE L. REV. 315 (1997).

⁴⁸ For Lustbader, technicians possess "a foundational understanding of the legal system, operant cultural values, and law school pedagogy." *Id.* at 331.

⁴⁹ Drafters "move away from mechanically applying basic concepts" and begin to "develop arguments, and justify conclusions." *Id.* at 341.

⁵⁰ Lustbader actually divides the designer category into two stages: Beginning Designer and Established Designer. Beginning Designers are able to "develop their analysis to include all legally significant facts and focus only on essential arguments," while Established Designers are able to deviate from standard legal argument formulae to adapt to the specific requirements of their own legal interpretation. That is, they can "manipulate and shape the organization of their analysis to serve the area of law in question and the problem they are resolving." *Id.* at 347-48.

⁵¹ It is not clear that Lustbader expects law students to reach this level, and unlikely that beginning law students would be able to. Lustbader describes this stage as requiring students to operate on an "expert level," and observes that "[c]reators break the mold." She contends that "[creators] look at a legal problem, decide the outcome they want to achieve, and feel confident that they can achieve their vision." *Id.* at 351.

Lustbader takes as an operating assumption that learning the law is a matter of advancing from a lower to a higher level of comprehension and analysis.⁵²

Lustbader's essay is invaluable in its schematization and classification of different ways of looking at the law and different levels of sophistication within the process. She provides a crucial vocabulary for identifying and analyzing the various elements of legal education and legal analysis.⁵³ However, her assumption that students will move in predictable stages from the most basic microanalysis to sophisticated macroanalysis seems to me inaccurate, or at least incomplete. Given the hermeneutic interconnectedness of the concepts that beginning law students are attempting to learn, the abstractions she describes as available only to those in the end stages can offer insight even to those muddling slowly through learning the techniques of the early ones.

Much of Lustbader's essay addresses the students' problems in moving from less to more advanced stages and the difficulty in abandoning one model of analysis for another, more challenging model.⁵⁴ As Lustbader herself implicitly recognizes, legal pedagogy is not especially designed to direct students between or among the approaches she names. Moreover, law students can ill afford to work *slowly* toward the higher levels of interpretive sophistication and they are not well served by an educational process which fails to make clear at least some of what is expected of them.

Yet the design of most law school curricula seems to expect that students will almost immediately be able to grasp not just the technical details but the larger universe of assumptions that produce and contextualize those details. Students must quickly learn how to read cases, extract and distill the most important information, revise their distillation of law as cases accrete and begin to see them as building on one another. Finally, students must use that doctrinal synthesis to successfully answer novel fact patterns.

Some students find this process fairly intuitive. They can adapt easily to reorienting their sense of what "counts," learning how to read the material, and constructing the answers that fulfill the requirements of legal discourse. However, most are trapped within the hermeneutic circle, unable to see the connections be-

⁵² In fact, she describes the students' learning process as one of "progression" that is moving with ever-increasing sophistication to the final points of comprehensive theoretical understanding of the law. *Id.* at 322-323.

⁵³ *Id.* at 351.

⁵⁴ *Id.* at 319.

tween individual rulings and cases and the larger structures on which legal decisions are based. Most often, they get caught up in minutiae, or they float so high above the specifics of an issue that they cannot see how it requires a particular kind of approach. Some students cannot understand how they did poorly when they were following the rules so closely; others have trouble understanding what it is that is being asked of them.

Difficult as it is for many students to grasp the relationship between part and whole, it becomes even more difficult for them if they do not. Students need to be able to glimpse all the possible levels of legal expertise if they are to work towards achieving them; they have to recognize what mastery of legal analysis looks like in order to believe that they too can do it. What Lustbader describes as "levels of learning progression,"⁵⁵ I would imagine not as a ladder that students must climb rung by rung, but as a web of skills and concepts whose interconnections students recognize more fully only as they move more deeply into the network.

A. *Some Examples*

1. Paintings

One of the most important skills that beginning law students need to learn is the ability to discern and describe analogies and distinctions between comparable fact patterns. It is not uncommon for those who teach legal reasoning to ask students to describe differences and commonalities among foods, such as apples, oranges, and pears,⁵⁶ or pictures, of both iconic and obscure art, to practice these skills.

Teachers of law use this kind of exercise for fairly narrow purposes. The goal is to teach students how, technically, to do analogical or deductive reasoning in law and to develop means to establish various kinds of similarities or differences based on the kind of question being asked (such as: oranges and apples are like each other but not like pears because of their shape; or, oranges are not like apples or pears because their peel is inedible).

These metaphors for legal argument are apt beyond their most superficial and mechanical application. Notice that even in

⁵⁵ *Id.* at 322-323.

⁵⁶ For a thoroughly developed explanation of one such exercise designed to illustrate the principles of case analysis and contingency in legal interpretation, see Charles R. Calleros, *Using Classroom Demonstrations in Familiar Nonlegal Contexts to Introduce New Students to Unfamiliar Concepts of Legal Method and Analysis*, 7 J. LEGAL WRITING INST. 37, 42-48 (2001).

order to decide whether apples and oranges are like each other and pears are distinct, we already have to have made decisions about what parts of the category are important: color, shape, function. That decision-making process is interpretive; that is, it is theorizing. This is a hugely valuable function of legal education, and underlies much of what both law students and practicing lawyers do. In order to move beyond such simplistic categorizations as "these foods are spherical," "these are all fruits," or "these are all vegetables," students must on at least some level insert their own ideas—that is, their own interpretations—of what categories may be constructed and which items might be included or excluded.⁵⁷

Thus they need to learn more than how to make the distinctions. More importantly, law students need to be (or become) aware of the fact that they are making distinctions at all, and that the decisions they have made are only one set of options among many. They learn and will practice law in a context in which judges choose among theories offered by litigators not because one is "right" and others are not, but because one is at least incrementally more persuasive than others although all may fall along the continuum of the possible. Accordingly, students must develop the ability to discern not just the most obvious conceivable categorizations, but the panoply of possible distinction and analogies available to them. They must be able to then evaluate and be able to choose among these analogies for specific reasons: the most convincing, the closest fit to a fact pattern, the most original, the one that leads to the most appealing result, and so on.

In my teaching I use an exercise very much like this.⁵⁸ I have reproduced three nineteenth and twentieth century paintings that have some commonalities, and in examining these pictures my students and I try to synthesize a theory that connects them to each other. These three pictures are Mary Cassatt's *Young Mother Sew-*

⁵⁷ This is not to say that oranges and apples aren't still round (well, technically spherical). But it is to say that "roundness" is only one of many possible analogies that can be drawn, and the ability to think critically about analogy itself as a theoretical process both yields more possible analogies and illuminates what it is analogy is doing in the first place, and why the law uses analogy as such a powerful tool.

⁵⁸ Currently, I use such materials both in a course called Applied Analysis, a required course in legal reasoning taught in large sections to first semester first-year students, as well as in Principles of Legal Analysis, which my school requires in the second or third semester for students with lower-than-mean grade point averages. I have used, and could imagine using, similar materials in almost any beginning law course. I know that many law professors teaching first year subjects, including some of my colleagues, do so as well.

ing⁵⁹ and *Woman Washing Hands*,⁶⁰ and Jacob Lawrence's *Home Chores*.⁶¹



Mary Cassatt, *Young Mother Sewing*

⁵⁹ Mary Cassatt, *Young Mother Sewing* (1900).

⁶⁰ Mary Cassatt, *Woman Washing Hands* (1890-91).

⁶¹ Jacob Lawrence, *Home Chores* (1945).



Mary Cassatt, *Woman Washing Hands*



Jacob Lawrence, Home Chores

I use the typical law professor's tool of the far-fetched hypothetical to put the exercise in motion. I ask my students to imagine that they are recently-minted museum curators, and that these pictures, along with a substantial amount of money, have

been donated by a wealthy but eccentric family. One of the conditions of the gift is that the museum uses the money to acquire only paintings that are “like ours,” but that the family has provided no guidelines as to what the terms of resemblance are. Looking at these three pictures, we speculate about what kinds of commonalities we might expect to look for in future acquisitions.

From here, the students are likely to start with the most obvious similarities between the paintings. They are all of women, they all appear to be indoors, they are all wearing vertical stripes, and so on. They will also notice the most superficial differences: two women are alone; one has a child with her. Two are white; one is black. Each woman holds a different pose: one full face, one in profile, and one with her back to the viewer. Two are fully clothed; one is half naked. Two are washing (either dishes or herself); one is sewing.

This is just a brainstorming session in which we imagine every possible analogy and difference. Next I ask students to speculate as to which commonalities might be the most *significant*. For example, the donor family might be eccentric, but is it really likely that “vertical stripes” qualifies as their dealbreaker distinction? Would we not be more inclined to see “portraits of women” or “domestic scenes” as the defining category in which all three pictures would be placed?

Ironically, at this point of the exercise students are almost incapable of making those kind of common sense distinctions. In the previous six to eight weeks of the semester, they have been propelled into a hermeneutic crisis as they absorb the message that in law, almost any distinction, no matter how apparently minute, can be sufficient to determine the outcome of a case. However, they are not yet armed with a broad understanding of how and why some distinctions in law might be more important than others. They are caught between interpretive communities: they have absorbed enough law school instruction to have lost almost all sense of perspective. They are caught up in details, thinking that any fact that can be proven has as much probative value as any other, or at least that it *might*, if the judge says it does. They are, in some ways, temporarily incapable of deciding that while “wearing vertical stripes” may be an accurate connector among these pictures, it is not likely to be an especially relevant or useful one for the purpose of deciding on new art acquisitions.

Once we have talked through this crisis, students begin to find it easier to make comparisons beyond the simplistic analogies they

have come up with so far, and to construct a hierarchy of resemblances that might have some application to the paintings and the judgment of the donors. I then introduce a fourth painting by Linda Carter-Holman, *Market Day*,⁶² and ask whether it qualifies as "like ours," and why or why not.



Linda Carter-Holman, *Market Day*

⁶² Linda Carter-Holman, *Market Day* (1995).

This picture both complicates and simplifies the work of grouping and distinguishing.⁶³ It forces students to go back to the initial three pictures and refine their judgments (for example, “wearing vertical stripes” could in fact come back into play as a quality that would lead them to reject this painting), and also to construct persuasive narratives that bring new issues into play.

For example, sophisticated students can take our previous observations and push them into totally new directions—start theorizing not just about stripes/no stripes, but about the meanings that accrue within different images. Not only can they see amazing commonalities and differences (the significance of windows or other kinds of open spaces in each picture), but they can begin to understand why the “stripes/no stripes” distinction is too simplistic. While it might lead to a factual determination of whether to include the new image in our set, the judgment itself has no meaningful content beyond the distinction. That is, the only way to answer “why are stripes significant” is “because they are.”

Compare that tautological answer with “the women in the first three pictures may be wearing stripes as an indirect commentary on the fact that they are entrapped within the domestic sphere, no matter how privileged their positions within it. Hence in the last image, seemingly intended to be contemporary, the woman does not avert her eyes, does not wear stripes, and is positioned outdoors because her domestic work is her choice, rather than her prison.”⁶⁴ The implicit argument then is that our mysterious collectors are interested in paintings about women’s oppression within the domestic sphere, across race, class, and time, and the fourth picture instead represents the possibility of women’s self-determination, a far too positive vision for the pessimistic donors.

The latter is not simply more effective (although it certainly sounds smarter). Rather, it is attuned to the interpretive possibilities of the task. It is aware of the ways in which argument needs to connect with and convince its audience. And most importantly, it is more likely to persuade a judge (or a law professor marking a stack of examinations) because it constructs an argument that not only makes sense of the given materials, but

⁶³ I think it is particularly important to be explicit about the ways in which this new artifact focuses our synthesis of the prior ones—law students do not always make the connection that once understood, cases still must be reexamined, that is, *reinterpreted*, in light of subsequent cases or other developments in law.

⁶⁴ Prompted enough, even those students who consider themselves far removed from art criticism come up with such theories about the paintings.

also helps categorize any subsequent materials that we may later encounter. In this latter example the student is not simply recognizing similarities and differences; rather she seeks to explain—indeed, to theorize about—why those commonalities and distinctions might be *material*. Significantly, she is operating within, not overwhelmed by, the interpretive community. She *recognizes* that she is interpreting, and uses that recognition to refine her argument.

2. Cases

To ground these ideas about interpretation in the kind of work the students do everyday and to translate these concepts into a more material reality, we must eventually return to using actual legal decisions. The most helpful way to do this is to use another common strategy in teaching legal reasoning: working through a small, carefully chosen set of cases building on one another and requiring student synthesis to understand where the law stands in the context of each holding.

This closed universe model is almost always used to begin instruction in legal writing and legal reasoning, and is designed to lay the foundation for the kind of work students will be doing in their doctrinal classes.⁶⁵ Discerning how common law accumulates is at the core of the case method of legal education, and the goal in this kind of exercise is to show in microcosm how legal interpretation operates. This is especially helpful for students who are beginning to learn to read and understand cases because they can focus on a few cases on a specific issue, and, it is hoped, extrapolate from there to understand legal methodology as a whole.⁶⁶

⁶⁵ See, e.g., CATHY GLASER ET AL., *THE LAWYER'S CRAFT: AN INTRODUCTION TO LEGAL ANALYSIS, WRITING, RESEARCH AND ADVOCACY* 29-34 (2002) (analyzing a series of three cases to determine whether a plaintiff might have a claim for the anguish of witnessing her eleven-year-old nephew be hit by a reckless driver); LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS AND ORGANIZATION* 61-66 (1996) (combining the language of many cases to form one concise rule by a process of "synthesizing" opinions in order to adjudicate a contract not-to-compete clause); ROBIN S. WELLFORD, *LEGAL REASONING, WRITING, AND PERSUASIVE ARGUMENT* 95-106 (2002) (evaluating cases defining "dwelling" under burglary statutes); NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., *LEGAL WRITING AND OTHER LAWYERING SKILLS* 48-58 (4th ed. 2004) (deciding what constitutes tortuous false imprisonment); CAROLYN J. NYGREN, *STARTING OFF RIGHT IN LAW SCHOOL* 7-20, 44-49, 53-64, 75-86 (1997) (surveying the limitations of businesses' liability for serving defective foods).

⁶⁶ There are obvious advantages to this way of introducing students to the process of legal reasoning. Students can be expected to learn hands-on how to read and evaluate individual cases, then to examine the ways in which case law accumulates and changes meaning, and finally to recognize that synthesizing cases is not just additive,

Typically, then, we would conclude a closed universe problem with a writing assignment or an exam designed to promote a synthesized understanding of law that the cases generate. Law school exam questions are designed to linger on the edges of legal doctrine, to point students towards either side of a conflict, and to maintain a level of uncertainty and ambiguity in terms of possible outcomes.⁶⁷ Students are expected not just to regurgitate doctrine, but to imagine its implications, its legal history, and its interpretive potential. If they have learned to be thoughtful at that interpretive process, they are well prepared to construct not only a possible answer, but a well-argued and persuasive one.

This kind of exercise is uniquely suited, then, for the kinds of explicit conversations about interpretive strategies and critical analysis that I have been discussing. To illustrate, one of the closed-universe problems used addresses the question of what constitutes a "dangerous instrument" for heightened degrees of burglary under New York Penal Law.⁶⁸ Four New York cases that present increasingly ambiguous examples of judicial interpretations of what may constitute "dangerous instruments," include cases involving a handkerchief,⁶⁹ a pair of rubber boots on a defendant's feet,⁷⁰ a hard cast on a defendant's arm,⁷¹ and finally, a defendant's teeth.⁷²

The first two cases in the sequence establish that almost *anything* used to cause potential injury or death can qualify as a dangerous instrument under Section 10.00 of the New York Penal Law.⁷³ These cases highlight that the operative legal question is

but requires interpretation. Over the course of three or four cases on the same issue, some ideas that may previously have seemed marginal come to the forefront and some that appeared more central may recede, to form one concrete and knowable body of law.

⁶⁷ Additionally, many law professors pride themselves on asking questions which could just as correctly be answered in one way as its alternative.

⁶⁸ I did not originate this exercise, and am not the only one to use it. Over the years, different mixes of cases have been used to teach the exercise, and various professors have edited the materials in their own way, but credit for designing the original exercise belongs to Elizabeth Rosen and Michael Resko.

⁶⁹ *New York v. Cwikla*, 386 N.E.2d 1070, 1074 (N.Y. 1979) ("handkerchief used as a gag in this instance is a dangerous instrument" under New York law).

⁷⁰ *New York v. Carter*, 423 N.E.2d 30, 33 (N.Y. 1981).

⁷¹ *People v. Davis*, 466 N.Y.S.2d 540 (App. Div. 1983).

⁷² *People v. Owusu*, 712 N.E.2d 1228 (N.Y. 1999).

⁷³ *Cwickla*, 386 N.E.2d at 1074; *Davis*, 466 N.Y.S.2d at 541. These two cases also illustrate another point. The first offers little justification for concluding that a handkerchief may constitute a dangerous instrument. The second case offers a more methodical explanation: that the primary issue is not the common conception of the dangerousness of a particular item, but rather the specific use of the item during the

how the instrument is used. For example, a handkerchief certainly seems innocuous enough, but when used to choke⁷⁴ or smother,⁷⁵ it is easier to imagine the same handkerchief as a dangerous object.

As the case law progresses, however, and that principle seems to be well-established, other, thornier issues emerge. What do we mean by "instrument" at all? The Court of Appeals held in *People v. Carter* that an assailant's rubber boots qualify as a dangerous instrument when used to "stomp upon the head of a helpless victim."⁷⁶ But when we arrive at *People v. Davis*,⁷⁷ our attention shifts focus. The court in *Carter* predicated its decision on whether an "instrument, article or substance" was "used in a manner which renders it readily capable of causing serious physical injury"⁷⁸ to constitute a dangerous instrument, while the *Davis* decision asked a different question altogether. *Davis* was concerned with whether a hard cast on the arm of the defendant qualified as an instrument at all.⁷⁹ With very little critical examination of the question, the court supported the jury's conviction of the defendant and implicitly concluded as a matter of law that a hardened plaster cast attached to the defendant's right arm could constitute a dangerous instrument.⁸⁰

Some of the unresolved questions in the foregoing cases come to a head in *People v. Owusu*,⁸¹ where the Appellate Division concluded that teeth can be "dangerous" within the meaning of the statute.⁸² The New York Court of Appeals, however, noted the longstanding rule that "a part of one's body is not encompassed by the terms 'article' or 'substance' as used in the statute."⁸³ Thus, the court asked whether a part of a person's body can be deemed a "dangerous instrument" within the meaning of the statute. Resting on previous decisions, the court pursued a lengthy analysis of how a body part can be construed as an object.⁸⁴ Rejecting what it

crime. *Davis* helps the reader go back and better understand, that is, *interpret*, the meaning of *Cwickla*. Compare *Cwickla*, 386 N.E.2d at 1074, with *Davis*, 466 N.Y.S.2d 540.

⁷⁴ *Cwickla*, 386 N.E.2d at 1074.

⁷⁵ WILLIAM SHAKESPEARE, *RICHARD III*, act IV, sc. 4.

⁷⁶ *New York v. Carter*, 423 N.E.2d 30, 33 (N.Y. 1981).

⁷⁷ *Davis*, 466 N.Y.S.2d 540.

⁷⁸ *Carter*, 423 N.E.2d at 33.

⁷⁹ *Davis*, 466 N.Y.S.2d at 540.

⁸⁰ *Id.*

⁸¹ *People v. Owusu*, 712 N.E.2d 1228 (N.Y. 1999) (citing *People v. Owusu*, 669 N.Y.S.2d 366 (App.Div. 1998)).

⁸² *Id.*

⁸³ *Id.* at 1230-01.

⁸⁴ *Id.* at 1231.

deemed the "use-oriented" approach to answering that question, the court reasoned that under that theory, bare hands could qualify as "dangerous instruments."⁸⁵ Instead, the court held that in using or threatening the use of a dangerous instrument, "the actor has upped the ante by employing a device to assist in the criminal endeavor."⁸⁶ In the court's pithy analysis, "Mr. Owusu's teeth came with him,"⁸⁷ and were not brought along with the purpose of doing harm.

Unlike the previous cases that were unanimously decided, the dissent in *Owusu* argues that the defendant's teeth, although a part of his body and an inevitable companion to his misadventures, did constitute a dangerous instrument.⁸⁸ Implicitly invoking the logic of *Cwikla*, the dissent contends that there is a significant difference between the usual uses to which teeth are put—biting and chewing food—and seriously injuring another person.⁸⁹ Just because the defendant had his teeth in his mouth did not automatically give him a license to bite someone with them.⁹⁰ The series of cases thus concludes with the most complex and multifaceted decision of the set.

As is typical of such exercises, once students have read and digested these opinions they must bring them to bear on a novel and ambiguous fact pattern. For example, in a scuffle between two men, one was comparatively unhurt while the other one suffered extensive bruises and lacerations from the prosthetic hand on his combatant's right arm. The hypothetical prosthesis is surgically and permanently attached to the arm, and though made of metal and plastic, functions very much like an organic hand. Students must determine whether or not the hand can be defined as a dangerous instrument.⁹¹

Usually, the approach students take is to work out whether the hand is more like a hard cast (dangerous instrument) or more like teeth (not a dangerous instrument). Together, we might generate a chart defining the factual distinctions between the two.⁹² For ex-

⁸⁵ *Id.* at 1232 (citing *People v. Vollmer*, 87 N.E.2d 291 (N.Y. 1949) (specifically rejecting the "use-oriented" approach)).

⁸⁶ *Id.* at 1235.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1238 (Bellacosa, J., dissenting).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Like many drafters of such hypotheticals, I am quite pleased by the fact that thoughtful students might answer the question either way.

⁹² It is interesting, or actually frustrating, to observe that when asked even novice law students can readily generate such a chart and will do a thorough and nuanced

ample, the hand is like a cast because it is not organic to the body; that is, while it is surgically attached, it can be removed and, in fact, used as a weapon in its own right. The hand can and did cause significantly more harm than a biological hand, as the fact pattern shows.

By contrast, the hand can also be seen as analogous to teeth. There is a bright line rule that body parts are not included, and the defendant used the prosthesis in precisely the same manner that any non-disabled defendant might have used a fist. Moreover, making distinctions between one kind of hand and another enters very sticky territory in terms of policy—do we have to judge the potential damage a large hand can do versus a small one, for example, in order to come to a finding of assault? Hands can do different kinds of damage: a punch with a closed fist can cause more damage than a slap with an open hand, but the law does not make that distinction. Finally, most students will turn to *mens rea*, noting that the defendant did not intend to use his hand as weapon; in fact, the problem states that he “uses the device quite comfortably as an extension of his own arm.”

Once the students realize that either position is equally arguable and, potentially, equally convincing, they tend to throw up their hands. If any position can be argued, and it all depends upon what most appeals to any given jury or judge, what distinguishes one analysis from another? Does any position have any kind of intrinsic superiority to any other, except strategically? This seems to reinforce all their worst fears about what it means to be a lawyer; they are entering a confraternity of smooth talkers who are more interested in technicalities than in justice, who often baldly conclude that “the judge could go either way” in analyzing the fact pattern.

But cooler heads usually prevail, and some students argue that in fact legal interpretation is, as Owen M. Fiss has observed, “constrained by rules that derive their authority from an interpretive community that is itself held together by the commitment to the rule of law.”⁹³ This is only partly satisfying, however. After all, claiming that one is only “following the rules” has often been the defense of scoundrels. The invocation of “rules” can make stu-

job of deciding which facts/factors should be included on each side. Yet when *not* asked to focus on factual distinctions possible for each side of a controversy, it is rare for students to examine these competing interpretations carefully, and rarer still to find it done with much nuance.

⁹³ Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 762 (1982).

dents feel even more distanced from law, as though their job is simply to absorb a set of standards and act accordingly.

Fiss is correct, of course, that law is an interpretive community. But as Stanley Fish argues in response to Fiss, the rules of that community are themselves neither inevitable nor self-evident.⁹⁴ They require a level of interpretation and "the very ability to read the rules in an informed way presupposes an understanding of the questions that are likely to arise . . . the kinds of decisions that will have to be made, the possible alternative courses of action," and so on.⁹⁵ Even just following the conventions of an interpretive community requires that we engage with "the 'deep' issues that underlie the issue of record," that is, questions of policy, of justice, of circumstance.⁹⁶ More importantly, "readers are already and always thinking within the norms, standards, criteria of evidence, purposes, and goals of a shared enterprise," and always integrating new information into those standards, readjusting themselves and the rules that apply to them.⁹⁷

Thus the difference between a competent analysis of the prosthetic hand question and an excellent one lies in understanding that interpretation is neither completely arbitrary nor completely determined by rules, but rather a complex dialogue between context, process, convention, and argument. Students need not just understand the facts, but have an *interpretation* of the case, a *theory*. Ideally, the question they will ask is not "is the hand like a cast or like teeth?" but "why is there a bright line rule excluding body parts from the category of dangerous instruments, on which side of the line does the prosthetic hand fall, and why?" We can theorize as to why a body part cannot be a weapon—it is an organic part of the self, intrinsic to it; when we hit with a hand or a foot, we are hitting with ourselves, perhaps even risking injury to ourselves which should pose some limitation on the severity of the assault. We imagine our bodies as a complete organism, not made up of articulable pieces.

We might suppose an additional step in the use of a dangerous

⁹⁴ Compare FISH, *supra* note 19, at 251-52, with FISS, *supra* note 93, at 229-48.

⁹⁵ FISH, *supra* note 19, at 251-52.

⁹⁶ Fish's instructive example can help here: he describes a basketball coach who teaches his star player all the rules and skills of the game except how to play an actual game. The player, needless to say, is a disaster: he is incapable of interacting with his teammates, or making decisions based on the situation at hand. Ultimately, he cannot play basketball, not because he does not know the rules, but because he has no idea how or in what context to apply them. *Id.* at 254-55.

⁹⁷ *Id.* at 262.

instrument: the decision to pick something up in order to use it. A dangerous instrument is separable from the self; it can inflict damage and emerge comparatively undamaged itself. The impact of the instrument is ultimately irrelevant (teeth can hurt much more than a butter knife.) The courts that have taken up this question seem to have decided that intention must be distinguished from effect, the body must be distinguished from its accessories. Ultimately, then, under this theory, this body of law is defendant-oriented. It says something about the *mens rea* of the defendant using a "dangerous instrument."

It is possible, though, to imagine constructing an alternative argument, perhaps one that imagines this assault statute as focused on the potential injury to the victim. Under such an approach we would reason that the heightened penalty for dangerous instruments exists because of the need to create categories of culpability in penal law. The statute in question proscribes a more severe punishment for assault with a dangerous instrument because there are stronger criminal sanctions for the *kinds* of attacks which are *more likely* to cause higher degrees of injury. Thus the cases reveal no hesitation about the "objectiveness" of the boot in *Carter* and the cast in *Davis*, so that each was unquestionably treated as an "instrument" for the purpose of the penal law.⁹⁸ Under this theory, *Owusu* was differentiated only because it crosses the line into incorporating an actual and undeniable element of the body. Barring such unambiguous exception, the courts' "use-oriented" approach will determine what may be considered an attack with a dangerous instrument within the meaning of the statute.

It is easy to see that these two theories suggest different results in the prosthetic hand case. Either is supportable, though perhaps not equally so.⁹⁹ But both are more sophisticated than a discussion which simply lines up the bases for factual comparison between prosthetic hand, plaster casts, and teeth.

So much of law is about drawing lines somewhere, resolving or avoiding slippery slopes. When the only tools available are factual analogies or distinctions, it can be impossible to determine where and whether those lines should be drawn. A theoretical inquiry offers more. When students can construct theories explaining why

⁹⁸ See *New York v. Carter*, 423 N.E.2d 30, 33 (N.Y. 1981); *People v. Davis*, 466 N.Y.S.2d 540 (App. Div. 1983).

⁹⁹ My personal bias is that, when looking only at these chosen texts, the explicit language of the majority opinion in *Owusu* favors the former argument. But I have certainly seen well-crafted and convincing arguments to the contrary. See *People v. Owusu*, 712 N.E.2d 1228, 1231-32 (N.Y. 1999).

the lines might or should exist, when they can learn not only to articulate but to evaluate such theories as “well, these women are wearing stripes and that one is not, so it is distinguishable” and “more central than the commonalities of clothing in the sample artwork is the fact that each comments on traditionally-feminine domestic work, but appears to do so from points of differing economic advantage,” they have learned something central, and quite sophisticated, about legal reasoning itself.

Not coincidentally, they can then generate far better, more persuasive, more effective, *smarter* responses to legal hypotheticals.

IV. THEORY IS A BASIC SKILL

With the ability to theorize comes not only an ability to speculate, but the possibility of seeing (or imagining) the big pictures of legal doctrine *while* recognizing and learning the details that make it up. Thus readers of law are prepared to operate on the higher levels Lustbader imagines, and are able in fact, to understand law more fully.¹⁰⁰ They become ready to move from rote notation in a Contracts outline that “to constitute consideration, a performance or a return promise must be bargained for,”¹⁰¹ to construction of their own formulation explaining that “we require consideration in order to deem an agreement legally binding because” With the latter, they are far better prepared to decide and to explain why a new and ambiguous fact pattern presents a bargain which is, or is not supported by consideration and hence enforceable in law.

But we live in an anti-theoretical culture, which means that many students, despite the best efforts of their undergraduate institutions (or because of those efforts) don’t come to law school with a theoretical orientation. Yet our educational programs are often set up as though they do, which certainly gives an advantage to

¹⁰⁰ I do recognize that the relationship is not as simple as I make it and that there are many intervening variables. For example, it is possible that students who have learned to theorize about law have also learned to theorize about *the process of learning law*. If so, such a student would likely possess the many documented advantages of self-directed learners. See Michael Hunter Schwartz, *Teaching Law Students to Be Self-Regulated Learners*, 2003 MICH. ST. DETROIT COLL. L. L. REV. 447, 466-82 (describing the attributes of self-regulated learners and arguing that they are more likely than others to exceed or excel in law school). Or it is possible that in a legal context, the ability to do what I call *theory* is simply an aspect of what those in another context might deem *creativity*. For a discussion of the value of creativity in at least some aspects of legal work and legal education, see Janet Weinstein & Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 CLINICAL L. REV. 835, 872-77 (2003).

¹⁰¹ RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (2001).

students with a background in critical thinking, but also then abandons everyone else. Thus it becomes the responsibility of legal educators to encourage, demonstrate and *demand* such thinking "early and often."

A theoretical approach cannot wait until the second or third year of law school, nor can it be offered only to the strongest and most academically successful students in the class.¹⁰² If it is not part of the very beginning of legal education then it is not an integral part of students' most elemental understanding of the profession of law. And without such tools, it is far harder for students to grasp, let alone to consider thoughtfully some of the most vexing questions and tensions in law, many of which are highlighted in the first year curriculum: *e.g.*, how will we decide which promises people make to one another will be enforceable in law? How much responsibility does each of us have to seek to prevent harm to others? What combination of bad actions and bad intentions is required for society to deem negative behavior criminal?

V. CONCLUSION

So theory can help students comprehend and learn law more successfully. Can theory "save your life?"

Certainly not literally. But on some level, it can save the sanity of at least some of our students¹⁰³ by giving these beginning lawyers some sense of understanding about what they are doing, and not incidentally, of being treated like thoughtful professionals. It shows that their minds matter, that there is more to law school than an expensive boot camp.

After all, theorizing is creative work. It is not simply problem-solving. Rather, it allows a student to think about why something might be a problem in the first place, or how to rethink it as a different kind of problem (or not a problem at all). Theoretical analysis is substantial—when students create or pose theoretical questions they feel like they've gotten somewhere. Being able to make and sustain connections between ideas is far more satisfying

¹⁰² To the contrary, I believe that such work is particularly vital for students who are struggling, because it is often the piece that they are missing in their comprehension of law. Such students may need, and certainly must be offered help in all of the rudiments of legal analysis. And they may need to be taught to understand and perform theoretical work in a particularly explicit and methodical manner. But my experience teaching such students suggests that many improve by leaps and bounds when we move *toward* the more complex ways of reading the material they are studying, rather than shying away from it.

¹⁰³ Hence, perhaps, teachers of law as well.

than simply being able to repeat doctrine. Students need theory not only because it helps them understand doctrine and do well in school, but also because it makes law school an *intellectual* experience. Without theory, law school graduates are not lawyers, they are, in Lustbader's sense, legal technicians, fiddling with unwieldy machinery but never imagining they can invent a new gadget altogether.¹⁰⁴

A mechanical approach to law, even when expertly performed, leaves little room for a meaningful critique of legal doctrine, our legal system, or our larger society.¹⁰⁵ After all, the law we teach is, for good reason, inherently conservative. It moves slowly and seeks to retain that which already exists. Absorbing that central methodology without also learning to see and ask the larger questions in law can seem to reinforce in our students a bias toward defending or maintaining the status quo.¹⁰⁶ This has a major toll on students psychologically. It's dispiriting. They begin to believe that the only way to succeed in law (and in the legal profession) is by following a narrow script of formulaic thinking and recommended behavior. Excitement and passion can be leached out of us, and the process takes on a Darwinian, survival-of-the-fittest character. Of course, such an effect is hardly a recipe for making good lawyers or happy people, and may account for at least some of the enormous stresses faced by law students.¹⁰⁷

But Robson's comments with respect to the lesbian legal theory she develops in *Lesbian (Out)Law* might be applicable to theory more broadly: "Theory can provide an analysis of the various options available to us, enabling us to make choices that might improve our survival."¹⁰⁸ As a shimmering example, Ruthann Robson doesn't simply *do* theory—she's *passionate* about it. That's partly

¹⁰⁴ Lustbader, *supra* note 47, at 330-39.

¹⁰⁵ It is just this inadvertent message that Chris K. Iijima is concerned about. Chris K. Iijima, *Separating Support from Betrayal: Examining the Intersections of Racialized Legal Pedagogy, Academic Support, and Subordination*, 33 IND. L. REV. 737 (2000). Iijima thoughtfully cautions those working in programs designed to help unsuccessful law students produce at least technically competent work that we not obscure the ways in which "the ideological and political intersect and influence the pedagogical" in law. *Id.* at 741.

¹⁰⁶ Though it does not have to, of course. Law often evolves slowly for good reason. And even the most traditional jurisprudence can find bases for change in specific bodies of law. But without an invitation to examine doctrine critically, legal education, and legal educators, may inadvertently help students equate conservative methodology with conservatism personally and politically.

¹⁰⁷ For an invaluable discussion of the stressful effects of legal indoctrination, see LAWRENCE S. KRIEGER, *THE HIDDEN SOURCES OF LAW SCHOOL STRESS* 7-8 (2004).

¹⁰⁸ ROBSON, *(OUT)LAW*, *supra* note 1, at 17.

because theory and passion are deeply intertwined. Students need to be passionate about learning in law school in order to excel.¹⁰⁹

Theory opens up not just the law but the world—it makes space for analysis beyond the task at hand, beyond *tasks* at all. It provides room for the abstract, for imagining alternate theories, perhaps even alternate worlds. And it makes room, not simply to “create” within law in Lustbader’s sense of the word,¹¹⁰ but to think critically not just *within* the legal discipline, but *about* it. Finally, it makes room for genuine critique of the legal status quo—not simplistic agreement or disagreement with cases’ outcomes, but thorough examination of the reasoning and rationales used by judges and advocates to support their positions. Certainly some of the most skilled lawyers aren’t always interested in that kind of questioning. But the best—the most imaginative, the most daring, the most courageous—see the law as a beginning, not an end. For them, for Ruthann Robson, law is ground for a fertile imagination and theory; the seed, the root, the plant, the fruit; a complex multifaceted organism that can nourish us all.

¹⁰⁹ And some may want or need such passion to challenge the (often unintentional) messages of conformity in legal education and in the legal profession as a whole.

¹¹⁰ Lustbader, *supra* note 47, at 351-53.

